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REALIGNMENT OF THE DOMESTIC AIR- LINE ROUTE PATTERN—PART II*

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III. SUMMARY AND CRITIQUE OF CAB DECISIONS

AN analysis of acquisition and transfer cases would seem to indicate that in many cases the Civil Aeronautics Board has not fully recognized its duties and responsibilities under the Civil Aeronautics Act. The general procedure has been first to consider the relationship of the route to be transferred to that of the acquiring carrier and the domestic route pattern as a whole. But in some cases the Board has completely ignored this responsibility or deemed it to be of little importance;⁷⁷ in other cases it has seemed to be more concerned with provisions of Section 408 (b) regarding competition than with the effect of the acquisition on the overall route pattern.⁷⁸

If the Board found acquisition to be desirable in either respect it then turned to its second consideration, that of valuation of the property to be transferred, including certificates. Here again the opinions are marked by an inconsistency and vacillation in policy that makes any generalization impossible. The Board, in the *First Marquette* and *Northeast* cases, made definite findings and statements of policy concerning valuation, only to make an about-face and in supplemental opinions to approve the valuation previously condemned. In the *First Marquette* and *National-Caribbean* cases, the Board made very definite statements concerning the evils of permitting value to be placed on a certificate for transfer purposes, yet subsequent opinions reveal nothing more than lip service to these former doctrines. Similarly, although the Board had established the policy of abolishing finder's fees and commissions in connection with transfers, later, as pointed out by the dissent to the *Western-Inland* decision, the Board failed to follow through with it.⁷⁹

A common factor found in all the cases approving valuation of a certificate for transfer purposes is the restriction the Board has imposed in the provisions that (1) price for intangibles must be written off to earned surplus and that (2) the approval of valuation in the transfer proceeding does not determine value for rate base or other purposes. The adequacy of this so-called safeguard was the subject of disagree-

* Continued from Autumn issue, 15 J. Air L. & C. 409.

⁷⁷ *Western-Inland*, note 35 *supra*.

⁷⁸ *United-Western*, note 21 *supra*; *American-Mid-Continent*, note 48 *supra*.

⁷⁹ *Western-Inland*, note 35 *supra*, (dissenting opinions of Members Warner and Branch).

ment between Mr. Landis and the majority of the Board. Only in the light of future developments can one properly evaluate the arguments on both sides of this issue.

One cannot help but note the vigilance of labor and its intervention in the principal acquisition cases. This fact would seem to indicate that in all cases involving the transfer of any substantial operation, following the pattern set in the field of railroad transportation, the rights and interests of labor will be protected. If the services of available labor are to be fully utilized with maximum efficiency and economy, it would appear to be most desirable and advantageous to make as many route transfers, consolidations and mergers as possible during the developmental stage of air transportation. This is to be preferred to waiting until air transportation has become overexpanded with the result that diminished service and consequent unemployment would follow approval of any route acquisition and transfer. This fact points to the need for effective and complete governmental control with power in the Board to initiate desirable transfers instead of merely passing judgment on air carrier proposals to do so. That the Board has such power, but has never exercised it was suggested by Mr. Landis.⁸⁰

Applicants have been careful to include property purchases, employment agreements, stock transfer arrangements and numerous other items in the certificate transfer transaction. By this technique, manipulation of price and valuation of property transferred have furnished a smoke-screen for valuation of the certificate transferred—the real issue before the Board. In order to prevent the issues from thus being beggled, the practice fostered by Mr. Landis of examining the valuation of each item as related to total price, as a step separate and distinct from the approval of any valuation of the certificate, should be encouraged. In this manner only those transactions essential to the transfer of the route certificate itself would be ferreted out for Board approval under the transfer sections; the approval of all other parts of the “transaction” would be determined in a related but separate proceeding under Sections 408 and 412.

Perhaps the most striking shortcoming shown by the Board is that nowhere has it related its action in approving an agreement to acquire and transfer a certificate to the overall policy of the Act, which is to regulate the air transportation system by means of the certificate of public convenience and necessity. The Board has, however, repeatedly recognized that the airline route pattern can be altered as effectively through consolidation, merger and acquisition as it can be through the issuance of a certificate of public convenience and necessity for a new route.⁸¹ Having gone this far, it is difficult to see why the Board did

⁸⁰ *United-Western*, *supra* note 36, at 342 (Landis, Chairman, dissenting).

⁸¹ See *United-Western*, *supra* note 56, at 306 where the Board citing the *National-Caribbean Atlantic* decision states: “. . . the Board has ever borne in mind the fact that the air map of the country can be changed as drastically by such transactions as by obtaining certificates of public convenience and necessity and, where such transactions might result in destroying a balanced route system, approval of the proposal has been withheld.” (Emphasis Supplied.)

not recognize further that, if a finding of public convenience and necessity warrants issuance of a certificate initially, and a finding of public interest, a synonymous term, warrants approval of its acquisition and transfer, the Board is actually re-evaluating the changing factors of public interest or convenience and necessity in the light of the directives of the policy section of the Act and reissuing the certificate in compliance therewith. Since valuation and price bid have no part in the original transaction, it would appear to be a miscarriage of justice to permit them to enter into any of the subsequent transactions.

So long as the Board considers price bid, carriers otherwise best qualified for operation of a route on the basis of public convenience and necessity and fitness and ability under Section 401 (d), may be barred from acquiring the same route under Section 401 (i). For instance, it is inconceivable that either Continental, Braniff, or Chicago & Southern could have outbid American for Mid-Continent's certificate.⁸² Furthermore, a directive that "franchise value" be considered in determining public convenience and necessity and public interest is specifically lacking from Section 2 of the Act.⁸³

Is it not surprising that an administrative body vested with such broad regulatory powers over a government-subsidized industry and specifically directed to act in the public interest would be so reluctant to exercise its powers? The Board has never experimented with the use of powers of the transfer sections in the ten years since passage of the Act.⁸⁴ Appendix A, derived from only those cases in which the Board has approved valuation and transfer of domestic route certificates, illustrates the consequences of the Board's policy of permitting a price to be placed on a route certificate.

IV. LEGISLATIVE HISTORY

Board decisions must be considered in the light of legislative history wherein the meaning and purpose of the directives to the Board were developed. In this manner, one can competently evaluate the Board decisions and possibly point the way for a change in the policy of the Board regarding route transfers.

A fundamental purpose of the 1938 Act was to centralize and obtain more adequate economic regulation of air transportation.⁸⁵ This was

⁸² *American-Mid-Continent*, note 48 *supra*.

⁸³ Note 11 *supra*.

⁸⁴ The Board in 1942 recommended to Congress that "... the Board be given power to institute investigations, as a result of which it may find that public convenience and necessity require air transportation over new routes, and the Board be authorized to issue certificates, after making such determination, to those who may apply for permission to operate the routes." Annual Report of the CAB 15 (1942). This request has not since been repeated. Apparently the Board's concept of promotion and development of air transportation insofar as route pattern is concerned, contemplates accretion by addition rather than constructive realignment, adjustment, and deletion.

⁸⁵ "The proposal in this bill, speaking generally, is, first, to unify the existing agencies of the Federal Government for the control of aviation, assigning duties now exercised by these three departments to the unit authority to be created by

to be accomplished in part through the issuance of certificates of public convenience and necessity. Certificates of public convenience and necessity have been used for many years as a means of regulating public utilities.⁸⁶ In creating the Civil Aeronautics Act, Congress drew from the general background of public utility regulation. A primary function of the certificate is to protect the public interest by giving complete control of the airline route structure to the CAB, the administrative body which issued and controlled the certificate. Thus, a concept of regulation which had been tried and tested was adopted for use in the regulation of air transportation.

The first forceful presentation in favor of the issuance of certificates to the airlines was made by the Federal Aviation Commission (FAC). Following the airmail contract cancellations in 1934, this Commission was created to make a thorough examination of the aviation industry and to make recommendations to Congress.⁸⁷ An examination of the testimony before the FAC reveals that many persons both in industry and government at that time had very definite ideas concerning the duties of any regulatory commission which might be formed, its policy concerning the issuance of certificates of public convenience and necessity, and the extent of its control of the airline route pattern.⁸⁸ On the

this bill. In addition, the bill proposes the very important addition of placing commercial aviation under the economic regulation by the Federal Government." Statement of Clarence Lea, 83 Cong. Rec. 6406 (1938). See also, *Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on S. 3027*, 74th Cong., 1st Sess. 30 (1935); *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5234 & H.R. 4652*, 75th Cong., 1st Sess. 24-30 (1937); *Hearings before Committee on Merchant Marine and Fisheries on Section 4 of H.R. 9710*, 75th Cong., 3rd Sess. 18-35 (1938).

⁸⁶ The certificate has been used not only as a control over entry into business but also has been required for such purposes as extension or abandonment of services and re-entry into a public utility business. Those operators who had been in business prior to the date that certificates were first required were usually either exempted from the requirement of obtaining a certificate or issued one automatically under "grandfather" privileges. The function of the certificate, i.e., to protect users of the service, the consuming public, was implemented by the regulatory commission which evaluated the financial condition and capabilities of the applicant and the need for additional service in light of elimination of needless facilities and unnecessary competition. By elimination of these unnecessary and expensive outlays of capital, the public benefitted directly by obtaining services at the lowest possible rates commensurate with operating efficiency. *Barnes, The Economics of Public Utility Regulation* 229 (1942); *Troxel, Economics of Public Utilities* 49 (1947); 51 C.J. §95; 6 Words & Phrases 431 (Perm. Ed. 1940).

⁸⁷ Airmail Act of 1934 §§20 and 21, 48 Stat. 398, 39 USCA §469 (Supp. 1937).

⁸⁸ General William Mitchell testified that since the government was paying for all the facilities—airports and navigation aids—to help the airlines, the general public rather than a few individuals should get the return from the operations of the airlines. 2 FAC Hearings 628,739. Captain Eddie Rickenbacker and Jack Frye recommended that certificates of convenience and necessity should be issued for a ten year term with power in the regulatory commission to initiate remedial action as well as to control airline action. They recognized the right to purchase certificates or merge routes, but felt that one of the main causes for the airline ills was the continual reshuffling of the airline routes under the airmail contract method of regulation. *Id.* at 821. Dr. Edward Warner wanted limitations to be placed on purchases and consolidations in order to prevent monopoly. 1 FAC 378. Messrs. W. A. Patterson, Lester D. Seymour, and Charles B. Munro all felt that the issuance of certificates to secure a degree of permanency in operation would be most desirable. 3 FAC Hearings 1070, 1083, 1131, 1272. Mr. W. A. M. Burden stated that public interest would be served best by the development of a system which would become self-supporting as rapidly as possible. To accomplish

basis of this testimony, the FAC recommended: "All regular domestic and scheduled transport operations should require a certificate of convenience and necessity to be issued by the commission hereinafter proposed."⁸⁹ In commenting upon this recommendation the Commission noted:

"... There should be a check on development of any irresponsible, unfair, or excessive competition such as has sometimes hampered the progress of other forms of transport. ... We can see no way of introducing an adequately flexible control over a rapidly developing art unless the flexibility be extended to commission power to select operators for new routes and to determine from time to time the conditions under which they must render service."⁹⁰

It would appear that the FAC, by issuance of certificates of public convenience and necessity, sought to eliminate cut-throat competition in airmail contract bidding whereby an airline would be flourishing and in business one day and non-existent the next. Note that it made no recommendation concerning duration of certificate or change of route pattern to keep abreast of changes in requirements of service. This problem was purely one of administrative policy to be dealt with by the regulatory body "from time to time."

Following the report of the FAC in January 1935, many bills concerning the regulation of air transportation were introduced in Congress.⁹¹ Inasmuch as none of the bills was passed prior to the 3rd Session of the 75th Congress in 1938, an examination of their content and of the hearings conducted on them is of little more than probative value in obtaining an insight into the philosophy of regulation propounded by government and industry. As will be pointed out later, the bills introduced during this period differed materially in some of their

this, he recommended a substantial reduction in airline route mileage by the issuance of a five year certificate only to such airlines as required airmail pay subsidy not in excess of 150 per cent of their commercial revenues. 4 FAC Hearings 1868-85. *Mr. Paul Braniff* pointed out that the government had had to bear the burden of the aviation industry for years and that the government regulatory body, by permitting uneconomical competition, was simply increasing the cost to the government, since it paid for the service. *Id.* at 1718. *Mr. Charles Lindbergh* noted the impossibility of drawing a permanent route map because of the many changing conditions involved. He felt that for this reason it was up to the regulatory commission to decide and create the route pattern. 5 FAC Hearings 1855, 1899. *Mr. Thomas B. Doe* stated that because of the government investment in developing the airlines, the government and the airlines were already partners. Therefore, the routes should be under complete control of the government and no permanent certificates should be issued until an airlines became self-supporting. *Id.* at 2064-79. *Mr. William P. McCracken* believed that the airline map and the number of routes to be flown should be determined in the discretion of the regulatory commission. *Id.* at 2167. *Mr. Joseph Ripley* desired that there be no grandfather rights and that certificates be issued only to companies which could demonstrate their ability. In this manner, the new regulatory commission could change the airway map without the encumbrance of existing deficiencies in route pattern. *Id.* at 2184, 2187.

⁸⁹ Report of FAC 9, Recommendation 5 (January 30, 1935).

⁹⁰ *Id.* at 54-56. The FAC tempered its remarks concerning flexibility with the following statement. "The air transport map cannot be redrawn every few years without utterly disastrous effect on the service. New lines ought to be created on a substantially permanent basis. An air line cannot be casually torn up and transplanted. . . ." *Ibid.*

⁹¹ *Rhyme, Civil Aeronautics Act Annotated, Appendix A (1939).*

provisions from the Act as finally passed by Congress. In general, however, they contained grandfather privileges, consolidation, acquisition, merger and certificate transfer clauses which closely paralleled those of the Motor Carrier Act.⁹² Thus a certificate could be transferred pursuant to such rules and regulations as the Commission might prescribe.⁹³

The Air Transport Association of America (ATA) actively participated in drafting many of the bills introduced and through the testimony of Colonel *Edgar S. Gorrell*, its President, one may discover the airline position on and interpretation of the proposed legislation.⁹⁴ He pointed out that grandfather provisions merely restated the usual policy contained in other regulatory Acts and recognized that the purpose of the provision was to preserve the existing system.⁹⁵ Mr. Gorrell felt that competition should be restricted to an extent needed for an orderly expansion of the industry through the issuance or withholding of certificates of convenience and necessity. To him a certificate meant "nothing but an authority to fly between the points specified in that certificate."⁹⁶ In commenting on consolidation and merger provisions, he said that through the exercise of sound administrative discretion, desirable economic adjustments could be made without creating dangerous monopolies. Whereas Mr. Eastman, the Federal Coordinator of Transportation and recognized authority on transportation regulation, had expressed the opinion that the consolidation and merger clause should contain a specific phrase about preserving competition, Mr. Gorrell desired that the language follow closely the Motor Carrier Act with the test being "public interest." He explained the operation of this section as follows:

"... Consolidations may be desirable from time to time in the future for a variety of reasons, not the least of which is preventing an economical unit from disappearing in the throes of bankruptcy. Under the proposed legislation a method of bringing about such consolidations is provided . . . which will enable the Commission, in an orderly way, to examine fully into the merits of any such proposal, and to authorize or prevent as the public interest will best be served. Not only is this true of outright consolidations and mergers, but it is equally true of all forms of acquisition of control through direct or indirect means."⁹⁷

⁹² "Any certificate may be transferred pursuant to such rules and regulations as the Commission may prescribe." §305(1) of S. 2 and H.R. 7273, 75th Cong., 1st Sess. (1937).

⁹³ *Ibid.* and note 119, *infra*.

⁹⁴ *Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on S. 2 & S. 1760, 75th Cong., 1st Sess. 223-227; Hearings before Committee on Interstate and Foreign Commerce on H.R. 5234 & H.R. 4652, 75th Cong., 1st Sess. 52 (1937).*

⁹⁵ Representatives of the Post Office Department and Bureau of Air Commerce objected to grandfather clauses awarding certificates to present operators as a matter of right. They argued that in this way the air transport field would be monopolized by existing carriers. *Hearings on S. 3027, supra* note 85, at 118; *Hearings on S. 2 & S. 1760, supra* note 94 at 90, 119, 185, 351, 423; *Hearings on H.R. 5234 & H.R. 4652, supra* note 94, at 122-126.

⁹⁶ *Hearings on H.R. 5234 & H.R. 4652, supra* note 94 at 277.

⁹⁷ *Id.* at 81.

As a result of hearings conducted by an Interdepartmental Committee during the Fall of 1937, bills to regulate civil aviation introduced in the 3rd Session of the 75th Congress in 1938 differed materially both in form and basic policy from those which had been previously introduced.⁹⁸ HR 9738, introduced March 4, 1938, the basic bill which, as amended later became the Civil Aeronautics Act of 1938, contained in Section 402 (l) the language now found in Section 401 (i) of the Act.⁹⁹ Whereas bills introduced prior to HR 9738 contained certificate transfer provisions, modeled after the Motor Carrier Act, permitting certificates to be transferred under rules and regulations prescribed by the Commission, HR 9738 contained the language of Section 401 (i) permitting only those transfers found to be in the public interest.¹⁰⁰

Mr. C. M. Hester, who participated in the drafting of the bill and later became the first Administrator of the Civil Aeronautics Authority, considered this change to be one of the primary differences between HR 9738 and prior bills.¹⁰¹ In testimony before the House Committee on Interstate and Foreign Commerce, Mr. Hester explained that the prior provisions did not appear —

“to be sufficient to authorize the ICC to prohibit the transfer of a certificate in the event that the transfer would be adverse to the public interest. Since, in many cases, the issuance of a certificate may depend upon the ability and integrity of the persons receiving it, it was considered advisable to include a provision which would clearly empower the Authority to prevent an undesirable transfer.”¹⁰²

Through the enactment of the Civil Aeronautics Act in 1938, air carriers obtained privileges far beyond their expectations or requests. The main thing they had asked for was a discontinuance of competitive bidding for airmail contracts and a permanent policy of regulation in one federal regulatory agency so that they could acquire capital and conduct their business on a sound basis. Whereas at first the carriers had asked for either temporary certificates pending their showing of adequate service or certificates *for a period of five to ten years, they obtained permanent certificates under the grandfather privileges.*¹⁰³ The certificate once obtained, however, could not be transferred or acquired by another carrier without a re-evaluation of the very factors which were considered in its original issuance. That this was the intent of Section 401 (i) is apparent from Mr. Hester's explanation. In this respect, as

⁹⁸ *Hearings before Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong., 3rd Sess. 439 (1938) ; Hearings on Section 4 of H.R. 9710, supra note 85, at 19-21.*

⁹⁹ §402(1) of H.R. 9738 and §401(i) of its companion bill in the Senate, S. 3845, contained the same language as does §401(i) of the Act.

¹⁰⁰ Compare §305(1) of S. 2 and H.R. 7273, 75th Cong., 1st Sess. (1937) with §401(i) of the Act.

¹⁰¹ *Hearings on H.R. 9738, supra note 98, at 36-41.*

¹⁰² *Id.* at 41.

¹⁰³ Compare statements made *supra*, notes 88-97, with language of §401(e) of the Act, 52 Stat. 987. 49 USCA §481 (Supp. 1948).

compared with other regulatory acts, the Civil Aeronautics Act would seem to be far more restrictive and to have a greater degree of control allocated to the regulatory agency. Control of the airline route pattern was understood by both industry and legislators to be vested in the CAB through its interpretation of the necessity for competition.

V. DECISIONS OF OTHER ADMINISTRATIVE AGENCIES

The Board has repeatedly made statements to the effect that:

"The reports of the Congressional Committee hearings held prior to the enactment of the Civil Aeronautics Act likewise indicate an intent to provide the same general type of regulation for air carriers as was then provided for railroads and motor carriers and that it was desirable to pattern the Civil Aeronautics Act upon such prior legislation in order to avoid confusion of interpretation, since that legislation was not new or untried but embraced definite policies built up over a period of years."¹⁰⁴

To support this proposition, the Board usually cites testimony by Mr. Gorrell and Mr. Eastman concerning bills introduced prior to the 3rd Session of the 75th Congress and which in fact were modeled after the Motor Carrier Act and would have placed the regulation of air transportation under the ICC instead of the CAB.¹⁰⁵

It is submitted that statements such as that made by the Board and quoted above are very misleading and not conducive to the development of a sound interpretation of the Act. As pointed out above, the bills introduced after January 1, 1938, were in many respects totally dissimilar from any of their predecessors both as to specific provisions and general overall policy. The final Act contains directives and confers responsibilities reaching far beyond those found in the ordinary public utility statute. As pointed out *infra*, this is particularly true in the case of Sections 2 and 406. Similarly, in Section 401 (i) an entirely new concept of control intimately linking the transfer of a certificate with its original issuance was incorporated into the Act.

Therefore, the policy of other state and federal regulatory agencies concerning transfer of certificates or operating rights is reviewed here merely to show what has been done under the specific language in other Acts. Through such a comparison it is hoped that the responsibilities and duties of the CAB in transfer cases may be clarified.

The states appear to have regulated the various public utilities by means of certificates of public convenience and necessity many years prior to the adoption of its wide use in federal regulation under the commerce clause.¹⁰⁶ Naturally, the holdings of the regulatory agencies

¹⁰⁴ *Acquisition of Marquette by TWA*—Supplemental Opinion, 2 CAB 409, 412 (1940) ..

¹⁰⁵ *Ibid*: *American Export Lines, Control*—*Amer. Export Air.*, 3 CAB 619, 628 (1942); *American Export Lines, Control*—*American Export Air.*, 4 CAB 104, 107 (1943); *American President Lines et al., Petition*, 7 CAB 799, 804 (1947); *cf. Id.* at 816, (Landis, Chairman, dissenting), where the distinction between the Act as finally passed and prior legislation is made in part.

¹⁰⁶ Note 86, *supra*.

vary from state to state depending upon variation in language of the respective statutes under which they function. Generally, the states have refused to approve a transfer to a purchaser who was wholly insolvent and have held such transfers to be unreasonable and unlawful.¹⁰⁷ Transfer agreements containing restrictive and non-competitive terms have been specifically disapproved.¹⁰⁸ In order to have the transfer of a certificate of convenience and necessity approved, it has not been necessary that any equipment be transferred.¹⁰⁹ All transfers of certificates were to be strictly scrutinized as to their effect upon the carrier industry as a whole.¹¹⁰

The various state regulatory agencies are divided on the question of whether or not a certificate may be split either into different types of operating rights or into segments of the route certificated to allow a partial transfer of the certificate. The majority would seem to disfavor splitting a certificate on the basis of strict statutory interpretation, by holding that general statutes authorizing transfer of a certificate do not give the commissions power to approve transfer of only a part of a certificate.¹¹¹ The only way this can be accomplished is for the commission to grant a new certificate for the particular type of operation or segment of the route which the applicants desired to transfer. Those states which have permitted partial transfers have done so on the basic assumption that a deviation from the general rule was justified where the public interest would benefit from more efficient, economical and improved service.¹¹²

The state commissions in general deal with the question of valuation in transfer cases in much the same manner as does the ICC. They permit a reasonable sum to be written off to surplus where the purchase price exceeds the value of property or assets transferred and where it has been shown that the ability of the transferee to render adequate service will not be impaired by the acquisition.¹¹³ The various commissions, however, have been very outspoken in their refusal to permit certificate transfers at inflated prices.¹¹⁴

¹⁰⁷ *Penna. R. Co. v. Pub. U. Comm.*, 116 Ohio St. 80, 155 N.E. 694 (1928).

¹⁰⁸ *Re Pacific Greyhound Lines*, 37 Cal. R.C.R. 517 (1932).

¹⁰⁹ *Re Schwank*, P.U.R. 1933B, 410 (Colo., 1932).

¹¹⁰ *Re Davis*, P.U.R. Dig. 201 (Cum. Supp. 1947-1948).

¹¹¹ *Houston & N. Texas Motor Frgt. Lines v. Johnson*, 159 S.W. 2d 905 (Texas 1941); *Re Sacramento Northern Railway*, 38 P.U.R. (NS) 319 (Cal. 1941); *Re Coast Line Express*, 57 P.U.R. (NS) 434 (Cal. 1944); 434 (Cal. 1944); *Re Foster*, P.U.R. Dig. C §140 (Colo. 1946).

¹¹² Splitting of certificates has been approved in the following cases: *Re Braddock*, 31 P.U.R. (NS) 171 (Ohio 1939); *Re Indianapolis & S. E. R. Co.*, P.U.R. 1933A, 293 (Ind. 1932); *Re Eaton*, P.U.R. 1933C, 281 (N.Y. 1932); *Re Blabon*, P.U.R. 1923C, 1 (Cal. 1922); *Re Kielhofer*, P.U.R. 1923C, 675 (Cal. 1923); *Re Bacon Service Corp.*, 30 Cal. R.C.R. 722 (Cal. 1927); *Re Motor Transit Co.*, 36 Cal. R.C.R. 85 (Cal. 1931); *Re Wabash Valley Coach Co.*, 1 P.U.R. Dig. §140 (Ind. 1930); *Re United Motor Transportation Lines*, 43 Cal. R.C.R. 69 (Cal. 1940).

¹¹³ *Ibid* and Note 111, *supra*.

¹¹⁴ In New York where a bus franchise had been purchased from a municipality it was held to be contrary to public policy to permit the transfer of the franchise for a payment in excess of the amount paid to public authorities. (*Re*

Inasmuch as the Board's opinion in the *United-Western* case contains a summary of the policy of the ICC and Federal Power Commission (FPC) with respect to price, little could be gained by reviewing their decision.¹¹⁵ That part of Section 8 of the Federal Power Act pertinent to this discussion reads:

"No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission . . . (and such license) shall be . . . subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee. . . ."¹¹⁶

In proceedings under this provision, the FPC has held that its power to approve transfers were no broader than its power to issue licenses in the first instance and a prospective transferee must be able to qualify in all respects as an original transferee.¹¹⁷ In the purchase of utility assets and facilities, the excess of the purchase price over valuation of assets transferred must be charged immediately to reserve created out of capital surplus.¹¹⁸

Eaton, P.U.R. 1933C, 281 (N.Y. 1932). Under this theory, public interest would appear to react even more strongly against permitting a payment for a franchise which had originally been issued gratis by public authorities. Other state commissions have recognized that no dependable transportation system can be established and developed when individuals are permitted to speculate in certificates of convenience and necessity. (*Re Grier*, P.U.R. 1922C, 131 (Cal. 1921); *Re Evansville Suburban & N. R. Co.*, 65 P.U.R. (NS) 500 (Ind. 1946); *Re East Penn Transp. Co.*, 41 P.U.R. (NS) 316 (Pa. 1941). Likewise, they have stated that the sale of operating rights should not be permitted when the result would be that shippers using the service would be obliged to pay rates which would provide funds for the purchase of a right which was granted originally by the state without charge. (*Re Clark*, P.U.R. 1922D, 491 (Cal. 1921). In 1941, the Pennsylvania Commission held that authority to transfer motor carrier rights under a certificate of public convenience and necessity at an excessive purchase price, to be paid for operating rights and goodwill and not for tangible physical property, should be denied, regardless of present earning power of the route and willingness of the purchaser to charge the sum to surplus or some other account. (*Re East Penn. Transp. Co.*, 41 P.U.R. (NS), 316 (Pa. 1941). Only recently, the Indiana Commission found that the primary purpose in the issuance of a motor carrier certificate of convenience and necessity was the establishment of a service between points or within a territory where either no service exists or existing service is inadequate to meet the needs of the shipping public, and not the creating of a salable asset which the holder thereof can hold without rendering any service and sell at his pleasure disregarding needs of the public. (*Re Evansville Suburban & N. R. Co.*, 65 P.U.R. (NS), 500 (Ind. 1946).

¹¹⁵ *United-Western, Acquisition of Air Carrier Property*, 8 CAB 298, 346 (1947).

¹¹⁶ 41 Stat. 1068, 16 USCA §801 (Supp. 1948). It is submitted that the results of citing decisions of other regulatory agencies without analyzing the statutory language under which they are made are as detrimental to formulation of a sound regulatory policy as the practice commented upon in notes 104-105, *supra*.

¹¹⁷ *Broad River Power Co. & Lexington Water Power Co.*, 1 FPC 363 (1937).

¹¹⁸ *Pennsylvania Electric Co.*, 3 FPC 557 (1943). The FPC orders without opinion approving license transfers are numerous. Transfers are generally made subject to §8 of the Federal Power Act and to the Commission's Rules and Regulations. *Kentucky Utilities Co.*, 1 FPC 788 (1939); *Pennsylvania Electric Co.*, 3 FPC 656 (1942).

Section 212 (b) of the Motor Carrier Act provides that:

"Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."¹¹⁹

The Transportation Act of 1940 repealed Section 213 of the Motor Carrier Act after which Section 408 of the Civil Aeronautics Act had been modeled.¹²⁰ Its provisions were incorporated into Sections 5 of Part I of the Interstate Commerce Act mentioned in Section 212 (b).¹²¹ Section 5 regulates all combinations and consolidations of carriers.¹²² Thus the ICC is directed to consider the requirements of Section 5 in any proceeding under Section 212 (b).

The regulations promulgated by the ICC to control the transfer of operating rights provide that a certificate may be divided as to routes or territories and class or classes of property authorized to be transported so long as that part of the operating rights sought to be transferred is clearly distinguishable and severable from the remaining operating rights, is different in the nature or type of service to be rendered and does not create duplicate operating rights.¹²³ The Commission recognizes that the lease of operating rights is a type of transfer.¹²⁴ Therefore, leases of operating rights are also brought under ICC approval by the regulations, and in case of reversion or discontinuance of operations, the Commission must be notified immediately.¹²⁵ On court review it has been found that consolidation of motor carrier rights was properly authorized where evidence supported findings that the consolidation would bring about economies and more efficient operation, improve service, leave ample competitor motor carrier service in the area affected, and would be in the public interest, although such findings do not negate the possibility that the merger would not be in accord with all provisions of the Federal anti-trust statutes.¹²⁶

As pointed out in the *United-Western* case, both the ICC and the FPC permit the transferee to charge off to surplus, write-ups created by acquisition prices in excess of value of property transferred.¹²⁷

¹¹⁹ 49 Stat. 555, 49 USCA §312 (Supp. 1948).

¹²⁰ 54 Stat. 924, 49 USCA §313 (Supp. 1948); 54 Stat. 905, 49 USCA (Supp. 1948); LOCKLIN, *ECONOMICS OF TRANSPORTATION*, 267 (1947).

¹²¹ *Ibid.*

¹²² *United States v. Resler*, 313 U.S. 57 (1941); *United States v. Marshall Transportation Co.*, 322 U.S. 31 (1944).

¹²³ 49 Code Fed. Regs. §179.1(e) (Cum. Supp. 1943).

¹²⁴ 49 Code Fed. Regs. §179.4 (Cum. Supp. 1943). "Applicants who seek approval of a transfer of operating rights for a limited period, whether by lease, operating contract or otherwise. . . ."

¹²⁵ *Ibid.* "In case of reversion, the transferor shall give immediate notice thereof to the Commission."

¹²⁶ *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

¹²⁷ Perhaps the best expression of the result of this practice is found at page 12 of the Annual Report of the Greyhound Corporation to its stockholders for the year 1946. There the directors present the shareholders with the following infor-

The Federal Communications Commission (FCC) is given jurisdiction over acquisition and transfer of radio station licenses under Section 310 (b) of the Communications Act of 1934:

"The station license . . . and the right therein granted shall not be transferred, assigned, or in any manner . . . disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said *transfer is in the public interest*, and shall give its consent in writing."¹²⁸

This language closely approximates that of Section 401 (i), as "public interest" is the yardstick for FCC action. It should be noted, however, that the Communications Act contains no section comparable to Sections 2 and 406 of the Act.¹²⁹ The licenses subject to transfer are granted for a period of from three to five years.¹³⁰ The FCC has refused to approve a transfer whereby the transferor retained a reversion, on the basis that once broadcast rights had been transferred, the former owner should receive no preference as compared to other applicants upon expiration of the term of the station license.¹³¹

The FCC has stated that the legislative history of Section 310 (b) shows that the legislative intention was that the Commission would prevent the transfer of a license to a person who would not be qualified to receive a license in the first instance or to disapprove of a proposed transfer, when, in light of all the facts, public interest would not be served thereby.¹³² The FCC has followed the practice of determining original cost, depreciated value and reproduction cost of all tangible property to be transferred.¹³³ Generally, transfers have been approved permitting payment of acquisition prices in excess of any of these

mation: "Pursuant to orders of the ICC approving acquisitions during 1946, the companies were required to write off \$739,546.00 against Earned Surplus, being the amount by which the purchase price exceeded the net book value of the tangible assets acquired. This brings the total to date of such write-offs to \$5,367,886.00." One cannot help but feel that such a statement would seem to be completely out of place in the annual report of a member of an industry in which fair return on investment is guaranteed by air mail pay subsidy allocated by the same regulatory body which has comprehensive control of the acquisition and transfer of certificates.

¹²⁸ Communications Act of 1934 §310, (d), 48 Stat. 1085, 47 USCA §310 (Supp. 1948).

¹²⁹ This fact was also noted by Mr. Landis. *United-Western*, *supra* note 115, at 334 (Landis, Chairman, dissenting).

¹³⁰ Communications Act of 1934 §307(d), 48 Stat. 1083, 47 USCA §307 (Supp. 1948).

¹³¹ *Alabama Polytechnic Institute*, 7 FCC 225 (1939).

¹³² *Falknor & Schepp*, 10 FCC 401, 404 (1944).

¹³³ *Lancaster Broadcasting Service, Inc.*, 2 FCC 154 (1935); *Walker, et al.*, 5 FCC 234 (1938); *Merced Star Publishing Co., Inc.*, 7 FCC 137 (1939).

amounts.¹⁸⁴ But where write-up for tangibles appears to be unreasonable, the Commission has found the assignment not to be in the public interest.¹⁸⁵ It has done so on the basis of Supreme Court decisions holding that past losses could in no way be capitalized for rate making purposes.¹⁸⁶

It is interesting to note that under a statute similar to the Civil Aeronautics Act, the FCC, unlike the CAB, does not permit the transfer of a license with strings attached such as a reversion to the transferor, and intimately links its action in approving a transfer to the original issuance of the license.¹⁸⁷ On the question of valuation, Mr. Landis would distinguish its responsibilities from those of the CAB on the basis that the FCC is dealing with an industry that is not a common carrier and whose earnings are not subject to public regulation.¹⁸⁸

VI. UNIQUE CHARACTERISTICS OF THE CIVIL AERONAUTICS ACT

In addition to those conclusions which may be drawn through a study of the CAB decisions, the legislative history of the Civil Aeronautics Act and a comparison of the statutes and decisions in other fields of public utility regulation, there are additional reasons to compel the conclusion that present policy of the Board regarding transfer of certificates of convenience and necessity should be revised. Distinguishing features of the Civil Aeronautics Act favor unique treatment by the Board of the issues involved in valuation and transfer of certificates of convenience and necessity.

There are many distinguishing features of the Act which place a greater duty upon the Board to act affirmatively and with initiative in regulating air transportation and to ignore precedent in other fields. The policy section of the Act is unique in the field of transportation regulation.¹⁸⁹ Under its terms the Board is directed to foster the devel-

¹⁸⁴ *Pacific Radio Corp.*, 5 FCC 427 (1938) (\$14,000.00 for property with present value to \$9,029.66); *Walker, et al.*, 5 FCC 234 (1938) (\$21,000.00 for property with present value of \$8,895.53); *Albert Stienfield & Co.*, 6 FCC 714 (1939) (\$35,000.00 for property with replacement value of \$29,640.54).

¹⁸⁵ *Travelers Broadcasting Service Corp.*, 6 FCC 456 (1938) (One member dissenting.)

¹⁸⁶ *Ibid.* The logic of the dissenting opinion is similar to that of the majority of the Board in the *United-Western* case.

¹⁸⁷ Primary considerations in any case are the legal, technical and financial qualifications of the transferee and improvement in service. The FCC has stated that the legislative history of §310(b) shows that its purpose was to empower the Commission to prevent the transfer of a license in the first instance. *Falkner & Schepp*, 10 FCC 401, 404 (1944). The FCC has promulgated Rules and Regulations similar to those of the ICC which control all acquisitions and transfers of station licenses. A notable feature of the FCC Regulations is that any party is permitted to file an acquisition plan for consideration by the Commission after an original application has been received. 47 Code Fed. Regs. §1.321 (Supp. 1946); *Id.* (Supp. 1947).

¹⁸⁸ *United-Western*, *supra* note 115, at 334 (Landis, Chairman, dissenting).

¹⁸⁹ This fact has been recognized by the Board that it does not warrant citation. For an analytical and interesting discussion of the relationship of the declaration of policy found in §2 of the Act to the Nation's over-all transportation policy, see Young, *A National Transportation Policy*, 12 Law & Contemp. Probs. 621 (1947).

opment of air transportation. The Board is not only given authority to regulate air transportation but is required to encourage and promote its growth to meet the nation's needs. Assuming sound management, the statute assures air carriers of a fair return on investment.¹⁴⁰

Other facts concerning the Act also would seem to compel the Board to proceed with caution and deliberation before abandoning control of the route pattern to airline management. For example, the Act contains no long and short haul clause;¹⁴¹ the Board may not award reparations should an air carrier assess unlawful charges;¹⁴² the anti-trust exemption provisions are much broader under the Act than under the Interstate Commerce Act;¹⁴³ the exemption and classification powers of the Board are much broader than the ICC's¹⁴⁴ and in case of an investigation and suspension proceeding, contrary to the provisions of the Interstate Commerce Act, the burden of proof would seem to be on the Board.¹⁴⁵ It is submitted that in any proceeding, such as one involving the valuation of a certificate for transfer purposes, the Board should give serious thought to these factors releasing government's control on a given industry before submitting still further to the requests of that industry to approve inflated valuation of certificates for transfer purposes.

A prime purpose of the Act, as admitted by both the legislators and the industry, was to bring security and stability to the airlines by the establishment of a definite policy of regulation and the elimination of cut-throat competition brought on by the necessity of under-bidding competitors for air mail contracts in order to keep a route system whole.¹⁴⁶ At the various hearings conducted in connection with the passage of the Act the quantitative bulk of the testimony was presented by the Air Line Pilots Association and the ATA.¹⁴⁷ At no time did a member of the public, those who use and pay for air transportation, appear and testify. Representatives of airlines and the ATA actively

¹⁴⁰ §406 of the Act, 52 Stat. 998, 49 USCA §486 (Supp. 1948).

¹⁴¹ Interstate Commerce Act, Part I, §4, 41 Stat. 480, 49 USCA §4 (Supp. 1948). The carriers have placed long and short haul provisions in their tariff rules, published under Part 224 of the Board's Economic Regulations. 14 Code Fed. Regs. § 224 (Cum. Supp.).

¹⁴² Compare §16 of Part I, Interstate Commerce Acts, 43 Stat. 633, 49 USCA §16 (Supp. 1948) with §§404 and 1002 of the Act, 52 Stat. 993, 1018, 49 USCA §§484, 642 (Supp. 1948).

¹⁴³ Compare 35 of Part I, Interstate Commerce Act, 42 Stat. 27, 49 USCA §5 (Supp. 1948) with §414 of the Act, 52 Stat. 1004, 49 USCA §494 (Supp. 1948).

¹⁴⁴ Compare §204 of Part II, Interstate Commerce Act, 56 Stat. 176, 49 USCA §304 (Supp. 1948) with §416 of the Act, 52 Stat. 1004, 49 USCA §496 (Supp. 1948).

¹⁴⁵ Compare §15 of Part I, Interstate Commerce Act, 54 Stat. 911, 912, 49 USCA §15 (Supp. 1948) with §1002 of the Act, 52 Stat. 1018, 49 USCA §642 (Supp. 1948). In addition see James, *Regulation of Air Carriers*, 11 I.C.C. Prac. Jour. 382 (1944) and Note, 11 J. Air L. & C. 359 (1940).

¹⁴⁶ Note 85, *supra*.

¹⁴⁷ It is submitted that the number of pages of testimony submitted by representatives of ATA and ALPA total roughly ten times those of any other two parties appearing at the hearings on the various bills leading to passage of the Civil Aeronautics Act.

participated in the drafting of much of the legislation.¹⁴⁸ Thus the passage of the Act was not prompted by the cries of a public long abused and discriminated against by a form of public utility in a superior bargaining position such as brought on regulation of the railroads and other utilities, but instead was the end product of a combined government-industry effort to prevent just such an event from ever occurring. It may be said then that in the Civil Aeronautics Act the airlines "wrote their own ticket" subject to the reservation of certain controls by government to protect the public interest which the public itself had not yet found voice to express. In view of this fact, the necessity of a firm policy on the part of the organization administering the Act becomes more apparent. If the evils of former years and of other industries are not to harass air transportation, the Board must truly regulate in the public interest.

VII. CONCLUSION

Having arrived at the conclusion that Board policy regarding certificate valuation and transfer should be revised, we have by no means answered the question of how the airline route pattern may best be realigned and its flexibility maintained. That this latter question is of current significance is apparent from the attention which it received from the President's Air Policy Commission¹⁴⁹ and the Congressional Aviation Policy Board in 1948.¹⁵⁰ These special commissions recognize the fact that the present airline route pattern was unsatisfactory. In order to correct deficiencies in the present pattern they recommend that (1) the route pattern be presently revised and (2) provision be made for maintaining flexibility in the future. Whether or not this can be accomplished spells the success or failure of the administrative process as exemplified by the CAB.

Nothing is to be gained by a sweeping revocation of certificates in repetition of the cancellation of the air mail contracts in 1934.¹⁵¹ Adjudication before the Court of Claims of damages resulting from the violation of contract and property rights is a poor substitute for affirmative, constructive action by the CAB.¹⁵² The following plan, therefore, would retain complete control of realignment and adjustment of the route pattern in the Board, the expert administrative body created for

¹⁴⁸ A most elaborate and somewhat irate discussion of this fact may be found in Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on S. 2 & S. 1760, 75th Cong., 1st Sess., (1937) 223-227, 341.

¹⁴⁹ Report of the President's Air Policy Commission, *SURVIVAL IN THE AIR AGE*, 110 (1948), reprinted, 15 J. Air L. & C. 756 (1948).

¹⁵⁰ Report of the Congressional Aviation Policy Board, *NATIONAL AVIATION POLICY*, Recommendation 33, 26 (1948), and see cross reference, 15 J. Air L. & C. 208 (1948).

¹⁵¹ The inadvisability of repetition of action similar to that taken in cancelling the air mail contracts and certificates in 1934 cannot be over-emphasized. Campbell, *Procedural Due Process in the Cancellation of Air Mail Route Certificates*, 21 Wash. L. Rev. 123 (1946); SMITH, *AIRWAYS* (1944).

¹⁵² Campbell, *supra* note 151, at 226.

that very purpose.¹⁵³ With the exception of the one amendment to the Act, hereinafter recommended, it is believed that the mechanics of the process of route alignment can be accomplished under the present statute.

In order to facilitate steps toward either maintenance of flexibility or revision of route pattern, Section 401 (i) should be amended to permit the splitting of certificates for transfer purposes either as to linear segment of route or type of operation. The following language might be used:

§ 401 (i) — No certificate or any part thereof may be transferred unless such transfer is approved by the Board as being consistent with the public interest. All transfers shall be made in compliance with rules and regulations prescribed by the Board.¹⁵⁴

It will be recalled that the CAB cited decisions of other administrative bodies to support its position regarding valuation of certificates for transfer purposes. The Board could better profit by following the example of the FCC and the ICC in developing rules under this new Section 401 (i). Thus, leases would be recognized as transfers; reversionary interests would be prohibited; transfers would be recognized as a re-evaluation of public convenience and necessity (public interest) in the light of changing factors; and a re-issuance of the certificate would be authorized to the most competent and logical recipient.

With this new tool at hand to facilitate transfers, the Board should institute a proceeding under Sections 205, 401, 407, 415, and 1002,¹⁵⁵ wherein all the airlines would be required to file with the Board information as to what they believe to be an efficient route pattern for their respective systems; the ATA, Post Office Department, Secretary for Defense, representatives of the Armed Forces, and all interested parties should also file plans of what they believe the requirements of a domestic route pattern should be.

The Board, using the great mass of statistics, operational data, information of the Post Office Department, etc., available to it, should then commence its own route evaluation study. Before arriving at any conclusion regarding the route pattern to be formulated, the Board should make the following policy determinations.

1. The extent of federal regulation ranges from the individual entrepreneur who is comparatively regulation-free, through the public utility and transportation industries where regulation is

¹⁵³ By recommending that a "disinterested non-governmental agency" make a route study and prepare a basic route plan, the Congressional Aviation Policy Board seems to have ignored the fact that the Board maintains the basic data and figures which would be needed for such a study and therefore is in the best position to prepare a basic route plan. Note 150, *supra*.

¹⁵⁴ An attempt has been made to incorporate the desirable features of both §212 (b) of the Motor Carrier Act and §310 (b) of the Communications Act of 1934 into this proposed amendment of §401 (i). Notes 119 and 128, *supra*.

¹⁵⁵ 52 Stat. 984, 987, 1000, 1004, 1018, 49 USCA §§425, 481; 487, 495, 642 (Supp. 1948).

intensive and extensive, to such enterprises as the Postal Service, TVA, and the Inland Waterways Corporation, which may be said to be truly Federally owned and operated. Somewhere along the line, policy determinations and regulation of the administrative tribunal regulating a particular industry may be so far-reaching and effective as to displace managerial discretion and actually guide actions of the regulated industry. At this point what is considered as private enterprise, for all practical purposes, becomes a nationalized undertaking.¹⁵⁶ It is not advocated here that the airlines of the United States be taken over by the Federal Government. That is an experiment of other countries to be examined objectively.¹⁵⁷ *What is advocated is that the CAB determine, as a policy matter, especially in the light of Sections 2¹⁵⁸ and 406¹⁵⁹ of the Act, to what extent the airlines should be treated as nationalized industries.*

This is the primary determination which should be made and which will largely control the answer to the remaining policy questions.

2. If airline management is in business either for and or with the Government, *what meaning should be given the phrase "honest, efficient, and economical management" found in Section 406 of the Act?*¹⁶⁰

3. In the light of these determinations, the Board should decide *what is the meaning, purpose and intention of a certificate of public convenience and necessity as a regulatory device in the Civil Aeronautics Act.*¹⁶¹ Is competition a *sine qua non* in air transport regulation or is regulation so extensive and complete as to guarantee the public protection in the absence of competitive factors?

After having made this analysis, the Board is in a position to construct a revised route pattern. It is suggested that a *route evaluation factor* be formulated which will equate air mail pay to all other airline

¹⁵⁶ In describing the relationship of the Federal Government to the U.S. railroads through regulation by the ICC, Professor Sharfmann states "... any clear cut differential between the sphere of private management and that of public control is largely obliterated. While the method of private ownership and operation is maintained, the Government participates intimately and extensively in fashioning the character and direction of the railroad's activities." 1 SHARFMANN, THE INTERSTATE COMMERCE COMMISSION 284 (1931). It is obvious that these statements apply with even greater force to the Federal Government's regulation of the airlines.

¹⁵⁷ The extent of nationalization of foreign airlines is described in detail in *Hearings before Committees on Interstate and Foreign Commerce on S. 987 and Bills Relative to Overseas Air Transportation*, 80th Cong., 1st Sess. (1947).

¹⁵⁸ Declaration of Policy, 52 Stat. 980, 49 USCA §402 (Supp. 1948).

¹⁵⁹ Rates for Transportation of Mail, 52 Stat. 998, 49 USCA §486 (Supp. 1948).

¹⁶⁰ To date the Board has applied and interpreted this phrase only when examining past conduct of management. See *Mid-Continent Air, Mail Rate for Route No. 48*, 2 CAB 392, 399 (1940); *Caribbean-Atlantic Air, Mail Rate*, 7 CAB 943 (1947). In the absence of specific Board policy suggestions, the Board's present conduct would seem to place airline management at an unfair disadvantage. The language of §406(b) indicates that the Board is not only to look to the past but also to the *present* and *future* in assisting airline management to attain the standards outlined in §406.

¹⁶¹ The following quotations are given to indicate the abundance of authority

management-created traffic revenues.¹⁶² In determining this factor, the Board should look at facts and not at unsupported claims of traffic potential. The Board would be afforded its first real opportunity to evaluate such factors as traffic movement and potential, community of interest, and traffic trends of the various routes for what they actually are and not for what air carrier applicants claim they will be.

The route evaluation factor ratio of air mail pay to passenger and cargo revenue would vary with the type of operation involved and would change as engineering developments produced a unit of transportation better adapted to the transportation demands of a particular route. If data either presently available or available after a trial period of operation do not meet the requirement of the route evaluation factor, the operation should be discontinued — the public will have spoken. Exceptions would be created only upon the request of the Post Office Department or the Armed Forces, and subsidization to meet the route factor requirements would be allocated from their funds.

The Board has also failed to recognize that Section 401 (h) of the Act is so worded that suspension of a certificate is a remedial corrective measure rather than punitive, as is revocation.¹⁶³

After having met all "due process" requirements the Board should announce its revised route pattern. Simultaneously, the Board would, in the public interest, convenience and necessity, suspend all route certificates and issue in lieu thereof, three to five year certificates for

and comment available to the Board for study in connection with the formulation of its answer to this question.

"Air transportation is an industry of decreasing unit cost with increasing size, principally because of high overhead expense and light traffic. Competition within the industry should accordingly be limited to service over alternative routes between large centers. The competition of surface transportation seems adequate to promote efficiency. Commission regulation appears to be prerequisite to the granting of monopolistic certificates of convenience and necessity for particular routes." MOULTON AND ASSOCIATES, *THE AMERICAN TRANSPORTATION PROBLEM* 759 (1933).

"In carrying out these great objectives of the Civil Aeronautics Act to foster sound economic conditions and to coordinate transportation by air carriers, the prohibition written into the Declaration of Policy against 'unfair or destructive competitive practices' must be observed; and to this end the power vested in the regulatory body to grant or refuse certificates of public convenience and necessity is essential." DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* 88 (1946).

"It (airline) had to apply for a certificate of public convenience and necessity — a legal device to keep air transportation from developing more rapidly than is convenient for vested interests." From p. X of Introduction, by Thurman Arnold, to WIPRUD, *JUSTICE IN TRANSPORTATION*, (1945).

"Certificates of convenience and necessity should be granted freely to any enterprise which is able to establish that it can render a service superior to any available or at less cost to the public." WIPRUD, *op. cit. supra* at 171.

¹⁶² See factors evaluated and analyses made in Raymond, *An Adequate Air Transport System for the United States*, *PROSPECTS AND PROBLEMS IN AVIATION* 49 (1945). It will be recalled that Mr. W. A. M. Burden recommended use of a route valuation formula to the FAC. His plan would have required discontinuance of operation over any route which "needed" air mail pay subsidy in an amount greater than 150 per cent of all other revenue. Note 88, *supra*.

¹⁶³ Note, *Suspension of Certificates of Convenience and Necessity under the Civil Aeronautics Act of 1938*, 14 J. Air L. & C. 512 (1947).

the new basic route pattern.¹⁶⁴ Only such route segments contained in suspended certificates which the requirements of public convenience and necessity, as reflected in the route evaluation factor, demanded, would be reinstated.¹⁶⁵

In addition to utilization of the suspension powers of Section 401 (h), flexibility of route pattern could be maintained by so interpreting Section 406 of the Act as not to warrant air mail payment to an airline management which inefficiently and uneconomically retains a route which is either more properly a part of another system or logically should be discontinued. Rules under Section 401 (i) would control all transfers.

The Board has a real opportunity to correct a recognized deficiency in its method of regulation and to erase past errors caused by an unintegrated route plan. No other administrative body has ever been given such a challenge. It is believed that a sincere effort by the Board to construct and administer such a plan in the public interest would be beyond judicial disapproval.¹⁶⁶

¹⁶⁴ Through their continued successful operation under 3 - 7 year feeder and foreign or overseas certificates of convenience and necessity, the air carriers have refuted their argument that a *permanent* certificate is an absolute essential to airline operation. Similarly, a brief study of the recent difficulties encountered by the certificated airlines to refinance their operations readily indicates that a *permanent* certificate does not necessarily attract capital to airline investment.

¹⁶⁵ In this connection it should be recalled that a different route factor would be determined for each type of route and for the operation into which the route is integrated—feeder, local, and trunk, etc. It may very well be that the Board would find that no operation over an existing route should be discontinued through suspension of certificates of convenience and necessity.

¹⁶⁶ *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456 (1924); *Crescent Express Lines v. United States*, 320 U.S. 401 (1943); *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945). Hale, *Hearings: The Right to a Trial, with Special Reference to Administrative Powers*, 42 Ill. L. Rev. 749 (1948).

APPENDIX A

**Valuations for Transfer Purposes, of Domestic Air Carrier Property, Including Certificates of Public Convenience and Necessity,
Approved by the CAB to Date**

Case and Citation	What Purchased	Purchase Price	Valuation of Physical Assets	Valuation of "Certificate" or "Franchise"	Mileage of Routes Transferred	Intangible Valuation Per Route Mile	"Intangibles" as Percentage of Purchase Price
<i>Acquisition of Marquette</i> by T W A, Supplemental <i>Opinion</i> , 2 CAB 409 (1940)	Stock, goods and all assets, including certificate of con- venience and necessity	\$ 313,333.33	\$ 30,000.00	\$ 283,333.33	557	\$ 508.68	90.4
<i>Western A.L. Acquisition</i> of <i>Inland A.L.</i> , 4 CAB 654 (1944)	100% of outstanding shares of common stock	\$ 415,471.00	\$ 296,000.00	\$ 119,471.00	1,252	\$ 95.42	28.8
<i>Acquisition of Mayflower</i> by <i>Northeast Air, Supple-</i> <i>mental Opinion</i> , 6 CAB 139 (1944)	Certificate of convenience and necessity and small tract of undeveloped land	\$ 17,500.00	\$ 8,300.00	\$ 9,200.00	129	\$ 71.32	52.6
<i>United - Western, Acquisi-</i> <i>tion of Air Carrier Prop-</i> <i>erty</i> , 8 CAB 298 (1947)	Certificate of convenience and necessity for Route 68, Los Angeles-Denver, and physical properties used in conjunction therewith	\$3,750,000.00	\$1,643,791.00	\$2,106,209.00	856	\$2,460.52	56.2
Average						\$ 783.99	57.0